Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	

REPLY OF THE RURAL TELEPHONE COALITION to COMMENTS FILED IN OPPOSITION TO PETITION FOR RECONSIDERATION

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SUMMARY

Commenters in opposition to the RTC's petition for reconsideration have not shown how the Commission's calculation of portable support is competitively neutral, or how it deters cream skimming. Commenters also fail to demonstrate how retention of the cap on the universal service fund complies with the Act or serves the public interest. The Commission's arbitrary shifting of 75% of federal universal service costs to the states is not justified by opposing commenters. Supporters of the Commission's interim provision for support of lines acquired by sale fail to show how the provision complies with Section 254 of the Act. The RTC maintains the focus of its discussion of a forward-looking cost mechanism on the need for verifiability, sufficiency and predictability. The RTC remains opposed to regulations that create unfair advantages for some companies under the guise of so-called "competitive neutrality."

Therefore, the Commission should rectify the RTC's concerns by implementing the recommendations included in the RTC's petition for reconsideration of the Commission's First Report and Order (FCC 97-157).

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The Rural Telephone Coalition (RTC) hereby responds to commenters filing in opposition to the RTC's petition for reconsideration of the Report and Order (FCC 97-157) ("Order") establishing new support mechanisms to ensure universal service. The RTC is comprised of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). Together, the three associations represent more than 850 small and rural telephone companies.

I. COMMENTERS OPPOSING THE RTC'S PETITION HAVE NOT SHOWN THAT THE COMMISSION'S CALCULATION OF PORTABLE SUPPORT IS COMPETITIVELY NEUTRAL AND DOES NOT INVITE CREAM SKIMMING

Telecommunications Resellers Association (TRA), AirTouch Communications (AirTouch), Comcast Cellular Communications/Vanguard Cellular Systems (Comcast/Vanguard), and General Communications all argue, in one fashion or another, for maintaining the Order's rules on the portability of Universal Service support. AirTouch (p. 6) begins by stating that the Act provides for support to carriers other than incumbent LECs. The RTC agrees. The concern of the RTC and others with the Commission's "portability" rule is that it diverts support from the carriers that actually invest in high cost rural service to new entrants that make no investment in telecommunications infrastructure, but may satisfy the requirements of Section 214 by merely purchasing some unbundled elements the Commission defines as the carrier's "own" facilities.[1] The resulting subsidized cream skimming is not prevented or mitigated, as AirTouch (p. 6) and Comcast/Vanguard (pp. 10-11) attempt to argue, by the Act's requirement that an eligible carrier provide and advertise service throughout the service area (47 U.S.C. §214(e)(1)). The requirement to serve the high cost areas can be met by reselling the incumbent's service, which has no cost at all to the new entrant if it has no customers or can be at least a break-even proposition. Moreover,

[1] Despite TRA's (pp. 8-9) support of the Commission's definition of "own" facilities, the FCC wrongly thinks that the requirement to receive support a carrier must offer service "either using its own facilities or a combination of its own facilities and resale of another carrier's facilities," (Sec. 214(e)(1)(A)), is met when a carrier using the incumbent's network by ordering unbundled elements for even a single service -- such as access to operator services -- without actually investing in any facilities. See, RTC Petition for Reconsideration, p. 13-18. In addition, AT&T's argument that an unbundled network element (UNE) purchaser "bears the risk" of the forward looking costs in excess of the benchmark is incorrect because the UNE user can obtain support for up to 100% of its UNE charges, based on the incumbent's actual costs, during the rural LEC transition period.

although it would be sound policy, the Act does not require entrants to charge the same rate throughout the high cost area, as AirTouch seems to assume. This allows entrants to advertise a higher rate in the parts of the area where it does not want customers. The RTC does not suggest that CLECs should not receive support if they meet the conditions of Sec. 214(e), but that support must be "specific" to the CLECs' costs of providing service to their particular customers, as Section 254(e) mandates.

The Comcast/Vanguard comments (p. 11) further postulate that competitive entry in high-cost areas will result in more efficient prices and therefore lower the costs of universal service. The comments do not explain how the overall cost of providing universal service to all customers can go down if a CLEC is able to receive support to serve the customers in a rural LEC's relatively low-cost area based on the incumbent's total averaged cost of serving the entire service area. This situation piles windfall on top of cream skimming and would only raise the cost of universal service in a rural LEC's service territory, at the expense of burdening ratepayers nationwide with support that exceeds the entrant's cost for universal service.

Finally, General Communication (pp. 7-8) asserts that universal service portability constrains the excessive costs of the incumbent LEC without severe financial impact on the incumbent. GCI continues by declaring that Sec. 254 was not designed to keep the ILEC whole, but to ensure that service is available through competition and supported where needed. GCI neglects the adverse impact for the ILEC of (a) losing the low cost customers the entrant "wins" and receives the windfall of the ILEC's average support to serve, while (b) the ILEC must continue serving the highest cost customers with only its average support -- which is, by definition,

insufficient in its above-average cost locations. Indeed, the assertion that ILECs' costs are excessive is pure conjecture, given no factual support, and without merit. GCI also does not seem to grasp the vital connection between the ILEC's "carrier of last resort" obligations and the provision of genuinely universal service. If rural ILECs, with their historical commitment to building area-wide facilities and serving all the customers in their study area, are unable to obtain support that matches their costs of serving their highest cost customers, who is going to provide the same quality service to the most high-cost, remote customers that do not attract competition?

Moreover, regardless of whether portability severely impacts incumbents, the question remains whether support mechanisms should be used to create windfalls for anyone. The Act requires "specific" support to ensure comparable and affordable service to customers. It is not intended to create advantages for new entrants. In short, the continued vitality of rural LECs -- not the unjust enrichment of entrants -- is necessary to insure that the provision of universal service does not deteriorate in the competitive era, contrary to Congressional intent. FCC policy that permits subsidized cream skimming in rural study areas where a competitor has not shown any real investment or commitment can only serve to weaken the Act's goals of providing universal service in the most economical manner possible and restricting support to the "provision, maintenance and upgrading of facilities and services for which the support is intended." (47 U.S.C. §254(e)).

II. SUPPORTERS OF CONTINUED CAPPING HAVE NOT DEMONSTRATED THAT RETAINING THE USF FEDERAL SUPPORT CAP COMPLIES WITH THE ACT OR SERVES THE PUBLIC INTEREST

Bell Atlantic and others, in opposition to the RTC's petition for reconsideration, contend that the cap imposed on the USF, which was introduced as a temporary measure, should be

maintained. However, cap supporters do not refute the position that extending the cap is both unlawful under the Act and contrary to public interest, as the RTC demonstrated in its Petition for Reconsideration (pp. 18-20).

Bell Atlantic, quoting the FCC order, claims continuing the cap would prevent "excessive growth" of the universal service fund (page 6). But Bell Atlantic does not explain how the FCC can warrant that a capped fund is either "sufficient" or "predictable." The fact remains that the cap is arbitrary. It cannot be justified merely to avoid exposure to the nebulous, undefined outcome of "excessive growth." The cap continues to serve as a disincentive to companies to upgrade and install new lines and equipment to serve high cost rural areas. The Commission simply has no authority to ignore the intent of Congress and suspend the Act's requirement of "sufficient" support -- even in the interim period while it considers permanent mechanisms.[2]

III. OPPOSING COMMENTS FAIL TO JUSTIFY THE COMMISSION'S ARBITRARY SHIFTING OF 75% OF FEDERAL UNIVERSAL SERVICE COSTS TO THE STATES

The RTC explained in its petition (pp. 1-6) why the Commission's last-minute, ill-considered shifting of 75% of the high costs of providing "the services that are supported by Federal universal service support mechanisms" (47 U.S.C. §254(a)) unlawfully palms off the majority of its statutory duty to provide a nationwide support mechanism for federally-defined universal service onto the states, to the particular detriment of customers in the most rural states. Several rural states share the belief that the 25% limit neglects the mandate for "sufficient" federal funding (Vermont PSB, p. 2; Arkansas PSC, p. 1), causes inequities between states (Alaska PUC,

[2] Competitive Telecommunications Association et. al. v. FCC, No. 96-3604, 1997 U.S. Appeals Lexis 15398 14 (8th Circuit, June, 1997). RTC Petition (pp. 18-19)

p. 7), impairs the rural and urban rate and service comparability required by Section 254(b)(3) (Vermont PSB, p. 5) and threatens abrupt losses in support (Wyoming PSC, pp. 1-4).

Opposing comments offer only weak defenses to the legal, procedural and factual challenges to the 25% limit. For example, Ameritech (pp. 3-4) does no more than rehash the Commission's unsupported assertions that the 25% federal share maintains the current loop allocation chosen, in Ameritech's view, "to ensure the permanent protection of universal service." It does not even allude to petitioners' showings, although the record establishes (RTC, pp. 3-4) that the 25% loop allocation excludes the additional allocations that recover high costs in nationwide interstate mechanisms and were designed to ensure adequate permanent support for high cost areas. Opposing comments also echo the Commission's offer to monitor the results of its 25% share (AirTouch, p. 15; Ameritech, p. 4; AT&T, p. 4), without explaining how future monitoring can provide the required "predictable" support, foster rural network investments or ensure the mandatory comparability of rural rates and service.

AirTouch adds nothing of value to the debate, partly because it relies extensively on quotations from the Commission's earlier effort in CC Docket No. 80-286 to reduce and refashion the existing universal service programs. The proposals and criticisms voiced in that aborted phase of universal service review are entitled to no weight: Contrary to AirTouch's assertion (pp. 11-13, 18-20) that the Conference Report indicates Congressional agreement that the prior mechanisms were "broken," provided a "blank check" for incurring high costs or in need of a "radically new approach," the quoted legislative history actually expresses Congressional concern that the

Commission's docket would undermine necessary support, that is, Congress's fear of "gloom and doom" (AirTouch, pp. 13-14) from a misguided Commission approach to "reform."

Bell Atlantic (pp. 3-4) and AT&T (pp. 2-10) do not deny the fundamental problem raised by the 25% limit -- heaping heavy cost burdens on the highest cost states and customers -- but instead disagree with the best way to remedy it. Bell Atlantic (pp. 3-4) wants to preserve the 25% interstate support limit, but avoid the diversion from current support for local rates that channeling all interstate reductions into interstate access charge reductions would produce. It proposes to use universal service support first to maintain the current level of state support from interstate sources (adjusted for inflation). It does not explain how this cap on state support can remain consistent with the Act's express requirements for "sufficient" federal support and "affordable," "reasonably comparable rural" rates. AT&T (pp. 3-6) half-heartedly defends the 25% interstate limit, but clearly supports a combined full support program assessed on both interstate and intrastate revenues.[3] Its support for a fully funded high cost program, however, is conditioned on assessing

[3] Bell Atlantic opposes a combined fund as unlawful under Section 254 (e)-(f). The RTC explained that the Section 410(c) separations Joint Board process Congress incorporated in Section 254 provides a great deal of latitude for jurisdictional separations adjustments, exemplified by the current expense adjustment and DEM weighting interstate allocations. Similarly, the separations process has used total, unseparated costs to determine the level of interstate high cost support necessary to keep local rates from increasing unduly. Thus, there is no reason to believe it would be unlawful to look at total interstate and intrastate retail revenues to allocate fair contribution levels. Separations, long linked to policy goals since there is no economic jurisdictional answer, can accomplish whatever level of interstate support is deemed desirable. Thus, debate over the legal limits of jurisdictional support responsibility for funding is little more than a red herring, and the legality depends more on how the interstate share is adopted than on the precise jurisdictional boundary for support that is drawn. However, AT&T is incorrect when it asserts (p.2) that the Act's requirement is that the federal and state programs "together" must be "sufficient." Section 254(e) specifically requires that "Federal universal service support" must be "sufficient to achieve the purposes of this section." Section 254(f) sets a parallel standard for any discretionary state funding.

support obligations on both inter- and intrastate revenues and reductions in both inter- and intrastate access charges to reflect the shift of existing access charge support to the combined fund.

The RTC believes that Sprint's comment (p.2), endorsed by AT&T (p.5), best sums up what the statute requires and Congress intended: Universal service, said Sprint, is a "national issue requiring a national solution." The RTC strongly urges the Commission to abandon its 25% interstate support ceiling, which is manifestly not a nationwide approach to universal service support, and adopt a plan that will shoulder the full federal responsibility the Act gives it for fulfilling the purposes of Section 254. If the states can agree to a joint approach, the RTC asks only that the mechanism be structured in a lawful manner that will not invite litigation or unfairly burden rural states, customers or carriers.

With respect to considering unbundled elements to be a carrier's "own facilities," state comments (e.g., Texas PUC at 8-9) confirm that the Commission's effort to direct the states how to implement Section 214(e), like other actions recently held beyond the Commission's jurisdiction,[4] unlawfully infringes on the states' exclusive statutory authority to designate eligible telecommunications carriers within their boundaries.

IV. THE PROPONENTS OF THE COMMISSION'S INTERIM PROVISION FOR SUPPORT OF LINES ACQUIRED BY SALE FAIL TO SHOW THAT THE PROVISION COMPORTS WITH SECTION 254 OF THE ACT

The RTC asked the Commission to reconsider its rule limiting federal universal service support to carriers purchasing exchanges after May 7, 1997 to the same level of support per lines

[4] See, Iowa Utilities Board v. FCC, Case No. 963321, (8th Cir., July 18, 1997) and California v. FCC, Case No. 96-3519 (8th Cir., August 22, 1997).

as the seller received prior to the sale (RTC Petition, p. 7). None of the parties opposing the RTC address the RTC's point that the Commission cannot suspend the Act's requirement that it provide "sufficient" support to ensure comparable rates and services to high cost areas over the long term as well as the interim period during which it decides on permanent mechanisms.[5] These parties also do not refute the fact that the Commission provided no basis for its finding that this interim rule will discourage reliance on support and, thus, necessary network upgrades, in the interim period while a forward looking cost methodology is developed.

AirTouch (pp. 21-22) and Bell Atlantic (pp. 6-7) provide no substantiation for their assertion that the availability of universal service funding inflates the purchase price of exchanges or defeats the public interest. The Commission has never made a finding to that effect in any of the numerous study area waiver applications that it has approved. The study area waiver process is designed to protect the public interest and needs no further supplement such as the interim rule. The procedures require that purchasers show upgrade costs and demonstrate why study area waivers are in the public interest. Moreover, the existing (albeit unlawful) cap on the high cost fund already operates to restrict the amount of support available to individual acquiring companies.

AirTouch also fails to substantiate its suggestion that the availability of support on the basis of the acquiring carrier's cost distorts market forces. Indeed, by restricting support to a level previously based on averaging within the larger ILEC from which the exchanges are acquired, the Commission has placed a new market-distorting implicit subsidy obligation on the purchasing ILEC. That smaller ILEC will likely need to raise its local rates if the high cost supports of the

[5] 47 U.S.C. §254(b)(3).

acquired exchange is frozen at the average support per line of the larger, generally urban-centered, seller. It is not the status quo represented by existing rules but the Commission's interim measure and the uncertainty over new mechanisms which is much more likely to distort market forces during the period before new support mechanisms are adopted. The interim rule adds another level of uncertainty, distorts decision making, and harms the public interest by totally ignoring the legitimate costs that acquiring companies will incur to achieve the objectives of universal service.

V. THE RTC's DISCUSSION OF A FORWARD-LOOKING COST MECHANISM REMAINS FOCUSED ON THE NEED FOR VERIFIABILITY, SUFFICIENCY, AND PREDICTABILITY

The RTC (p. 9) asked the Commission to reconsider its mandate for a universal service mechanism based on a yet-to-be-developed forward-looking economic cost. Comcast/Vanguard (p. 8) mischaracterize the RTC's petition as a request for "a continuing monopoly entitlement" that is "contrary to Section 254." In fact, a mandate for a future mechanism based on a cost methodology that is currently undeveloped and not yet proven to determine *forward-looking* costs correctly is contrary to Section 254.

Throughout this proceeding, the RTC has stressed the Act's requirements for a support mechanism that is both predictable and sufficient.[6] In its petition, the RTC (p. 10) pointed out that a currently non-existent cost methodology that cannot be verified to accurately predict costs for *any* company does not presently meet these requirements. Further, because there is no assurance that a

[6] 47 U.S.C. Section 254(b)(5).

verifiable model for rural carriers can be developed within the appointed transition time period,[7] the RTC (p. 11) requested that the Commission refrain from mandating that rural companies transition to a such a mechanism.

AirTouch (p. 17) maintains that the RTC's concern is unjustified, since the decision can be challenged at some future point in time should the Commission ultimately adopt an inappropriate model. The RTC agrees that any methodology ultimately adopted should be evaluated at that time. Nevertheless, the blanket mandate in this *Report and Order* to transition to an undefined methodology simply does not meet the statutory requirements of predictability and sufficiency.

VI. THE COMMISSION SHOULD NOT ADOPT RULES THAT CREATE UNFAIR ADVANTAGES FOR SOME PROVIDERS

AirTouch (pp. 4-5) opposes the RTC and Western Alliance petitions regarding the Commission's adoption of "competitive neutrality" as an additional principle. The RTC's concern is that by competitive neutrality the Commission, in an Orwellian twist, means that all rules should favor the new entrant over the incumbent. The Act itself is not competitively neutral in this regard, placing more burdens and obligations on incumbent LECs, including rural telephone companies, than on any new entrant while granting exemptions to regulation for wireless carriers.[8] However, aside from this explicit balancing of obligations Congress itself has reflected in the Act, Congress intended that all carriers bear universal service "on an equitable and nondiscriminatory

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[7] The RTC and several other parties continue to have serious doubts that such a model can be developed. *See generally,* comments of SBC LECs, Ameritech, Bell Atlantic/NYNEX, and Puerto Rico Telephone Company filed in CC Docket 97-160, August 8, 1997.

[8] See 47 U.S.C. Section 332(c)(8) exempting commercial mobile service providers from equal access requirements.

basis" (47 U.S.C. §254(d)). Whether the Commission requires (assuming jurisdiction to do so) or "encourages" states to limit rural service areas to contiguous territory, the effect cannot be said to be competitively neutral because it encourages competitors to exploit the competitive advantage of picking and choosing only the more profitable areas of a rural telephone company's service territory.

VII. CONCLUSION

The RTC has shown that commenters opposing RTC's Petition for Reconsideration have not refuted the RTC's positions. Therefore, the Commission should reconsider the First Report and Order (FCC 97-157), as previously requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Vanessa L. Fountain, hereby certify that a copy of the Rural Telephone Coalition's reply comments to Opposition to Petitions for Reconsideration were either hand delivered or sent on this, the 28th day of August, 1997 by first class United States mail, postage prepaid, to those listed on the attached sheet.

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